LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 22 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 13

RECEIVED
FEB 22 1969
OFFICE OF THE CLERK
SUPREME COURT, U.S.

WILLIAM L. MAXWELL
Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR RESPONDENT

JOE PURCELL
Attorney General

DON LANGSTON
Deputy Attorney General
Attorneys for Respondent

PARAGON PRINTING CO., LITTLE ROCK

INDEX

	Page
ARGUMENT	1
INTRODUCTION	1
I. ARKANSAS' Practice of Allowing Capital Trial Juries the Absolute and Arbitrary Power to Elect Between the Penalties of Life or Death for the Crime of Rape Violates the Rule of Law Basic to the Due Process Clause	3
A. The Discretion Given Arkansas Juries	3
B. The Role of the Jury and the Standards Argument	8
II. Arkansas' Single-Verdict Procedure For the Trial of Capital Cases Violates the Constitution	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:

Chatterton v. Dutton, 223 Ga. 243, 154 S.E. 2d 213 (1967)	6
Giaccio v. State of Pennsylvania, 382 U.S. 1110, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966)	6, 7
Hill v. United States, 368 U.S. 424, 82 S. Ct. 468, L. Ed. 2d 417 (1961)	12
In re Anderson; Cal.-2d, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968)	4, 5, 6, 7, 8, 11
In re Ernst's Petition, 3 Cir., 294 F. 2d 556, Cert. Den. 368 U.S. 917, 82 S. Ct. 198, 7 L. Ed. 2d 132 (1961)	5
Johnson v. Commonwealth, 208 Va. 481, 158 S.E. 2d 725 (1968)	6,7
Maxwell v. Bishop, 8 Cir., 398 F. 2d 138 (1966)	7; 11

	Page
McGandy v. Cunningham, 4 Cir., 296 F. 2d 600, 96 A.L.R. 2d 1268 (1961)	13
Nail v. State, 231 Ark. 70, 328 S.W. 2d 945 (1959)	3
Pope v. United States, 8 Cir., 372 F. 2d 710 (1967)	12
Segura v. People, Colo., 431 P. 2d 768 (1967)	13
Skinner v. Oklahoma, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (19)	6
Spencer v. Texas, 385 U.S. 554, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)	7,11
State v. Latham, 190 Kan. 411, 375 P. 2d 788 (1962)	5
State v. White, 60 Wash., 2d 551, 374 P. 2d 942 (1962)	6
Stevens v. Warden, 238 F. Supp. 334 (D.C. Md. 1965)	13
STATUTES	
Ark. Stat. Ann. §41-2304 (Repl 1964)	1
Ark. Stat. Ann. §41-3403 (Repl 1964)	1
Ark. Stat. Ann. §41-2227 (Repl 1964)	2
Ark. Stat. Ann. §41-4102 (Repl 1964)	2
Ark. Stat. Ann. §41-502 (Repl 1964)	2
Ark. Stat. Ann. §43-2153 (Repl 1964)	2, 3
Ark. Stat. Ann. §43-2108 (Repl 1964)	3
Ill. Rev. Stat. Ch. 8, Sec. 1.7(g) (1967)	10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968
No. 622

WILLIAM L. MAXWELL,
Petitioner,

v.

O. E. BISHOP, SUPERINTENDENT OF ARKANSAS STATE PENITENTIARY
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR RESPONDENT

ARGUMENT

INTRODUCTION

At the present time there are five offenses punishable by death in Arkansas: Kidnapping, Ark. Stat. Ann. §41-2304 (Repl. 1964), rape, Ark. Stat. Ann. §41-3403 (Repl. 1964), murder in the first degree, Ark. Stat. Ann.

§41-2227 (Repl. 1964), treason, Ark. Stat. Ann. §41-4102 (Repl. 1964), and burning of prisons by convicts, Ark. Stat. Ann. §41-502 (Repl. 1964). As originally enacted, these statutes provided automatically for the imposition of a death sentence. In 1915, however, Ark. Stat. Ann. §43-2153 (Repl. 1964) was enacted which gave the jury the alternative of imposing a sentence of life imprisonment or death upon finding one guilty of one of the above offenses.

With the possible exception of burning of prisons, it is submitted that the offenses now punishable by death in Arkansas are those that have been historically considered to be of a serious enough nature to warrant the harshest of punishments. Thus, we are not concerned with whether the offense now in issue is one for which the death penalty may be imposed.

Petitioner has cited many noted and eminent authorities for the proposition that the death penalty should be voided. While respondent certainly does not deny that there is a rather substantial movement under way to see that that goal is reached, respondent does not consider that this case involves the validity of the penalty, but rather only the validity of the procedural means used in imposing the penalty.

Respondent disagrees with petitioner that the question of discrimination in the imposition of the death penalty is now in issue. This point was extensively covered in petitioner's petition for certiorari, and the Court denied certiorari on this point. Nevertheless, the argument is raised anew on the theory that "where a state practice is challenged as conferring arbitrary and lawless power tending to abuse, in a manner forbidden by the Fourteenth Amendment, proof that the power has in fact been regu-

larly abused is entitled to considerable weight." (Petitioner's brief P. 5). The two lower federal courts found this "proof" legally insufficient and this Court denied the request for certiorari.

What this case really involves is whether the jury system is a workable procedure in capital cases. Petitioner contends that he would have no complaint to a jury's deciding the question of life or death if framed by adequate rules. But it is earnestly submitted by respondent, that a set of rules could never be drafted which would both protect the rights of the accused and the interest of the state.

I

Arkansas' practice of allowing capital trial juries absolute and arbitrary power to elect between the penalties of life or death for the crime of rape violates the rule of law basic to the due process clause.

A. *The Discretion Given Arkansas Juries.*

Turning first to the procedures followed in Arkansas in capital cases, Ark. Stat. Ann. §43-2153 (Repl. 1964) p. 1, supra, gives to the jury the sole discretion to impose a life or death sentence, and since Ark. Stat. Ann. §43-2108 (Repl. 1964) prohibits the waiving of a jury in a capital case, this decision is always made by a jury.

The penalty imposed by the jury will not be reduced unless the proof in the case fails to sustain the charge. *Nail* v. *State*, 231 Ark. 70, 328 S.W. 2d 836, 845 (1959). This, we submit, is by far the better policy, and is one that is not uncommon, particularly in the area of criminal law.

The basis for our assertion that this is the better policy is that the assessment of punishment, particularly in capital cases, is not only a legal question but a moral one as well. The Arkansas Legislature deems certain offenses to be so grave as to warrant the infliction of a death penalty. Until 1915, when Ark. Stat. Ann. 43-2153 (Repl. 1964) was passed, one found guilty of one of these offenses was automatically given the death penalty. Now, as noted above, the jury has a choice, and because it has a choice, something more than the guilt or innocence of the accused is in issue; the jury must decide whether the convicted will live or die. The Legislature did not undertake to decide which convicted rapist, for example, would live and which would die. And just as the Legislature did not attempt this determination, neither should the trial judge nor the Arkansas Supreme Court substitute its judgment for that of the jury.

The importance of this is twofold. First, the Arkansas Legislature deems the crime of rape to be of sufficient severity as to be punishable by death. Second, the Legislature logically recognized that under some circumstances those convicted of one of the offenses would be entitled to live. To state it another way, the Legislature recognized that the State had a sufficient enough interest in preventing these crimes and punishing those who committed them that it provided for punishment by death, but at the same time it saw that some circumstances operated to mitigate the crime, and thus it slackened the harsh rule of automatic death and allowed for a mitigation in punishment. Implicit in this point is the fact that the Legislature entrusted to the people of Arkansas the discretion of who would be sentenced to death and under what circumstances. Such procedure is not peculiar to the State of Arkansas. See *In re Anderson*,

Cal. 2d , 447 P. 2d 117, 73 Cal. Rptr. 21, 447 P. 2d 117 (1968); *In re Ernest's Petition*, 3 Cir., 294 F. 2d 556, Cert. Den., 368 U.S. 917, 82 S. Ct. 198, 7 L. Ed. 2d 132.

This attack on capital jury procedures is not novel. Most recently the California Supreme Court dealt with the problem in *In re Anderson, supra.* Justice Burke, writing for the majority, observed that "The Legislature, by entrusting to the absolute discretion of the jury the decision between life imprisonment and death has indicated its belief that jurors understand the factors that are relevant to such a decision." (447 P. 2d at p. 125). Respondent commends the same logic to the Court in this case.

Similarly, it was noted in *In re Ernest's Petition, supra,* that "it is a matter of legislative history in most jurisdictions, certainly in New Jersey, that the conferring of this power upon juries is potentially advantageous and, in no way hurtful to persons convicted of first degree murder, for the antecedent statutes rather generally made the death sentence mandatory in all such cases." (294 F. 2d at pp. 560-561).

Finally, the following statement is made in *State* v. *Latham*, 190 Kan. 411; 375 P. 2d 788 (1962) at page 797:

> "First, the sole power to provide for punishment of offenders belongs to the Legislature. It alone has the power to define offenses and affix punishments. Courts are empowered only to ascertain whether an offense has been committed, and if so to assess punishment, within the terms of the law, for its commission."

And further, at page 798 of 375 P. 2d:

> " . . . this court is neither authorized nor does it have any disposition to debate the question of

> the wisdom of capital punishment. The legislature determines the policy of the State in that regard and enacts statutes which the courts and other officials with respect thereto are bound to follow, which duties they are not privileged to ignore." See also *State* v. *White*, 60 Wash. 2d. 551, 374 P. 2d 942 (1962); *Johnson* v. *Commonwealth*, 208 Va. 481, 158 S.E. 2d 725 (1968); *Chatterton* v. *Dutton*, 223 Ga. 243, 154 S.E. 2d 213 (1967).

These authorities, we submit, stand for several propositions: First, the Arkansas procedure is not unique in American criminal procedure; second, it is within the power and authority of the Arkansas Legislature to provide for a death penalty; third, once the Legislature makes that decision, the courts cannot and should not substitute their judgment for that of the legislature or jury; fourth, and perhaps most importantly, it has never been thought that this procedure violates due process; "But even if it were practicable and desirable to have such a formula it does not follow that the Legislature's failure to provide one renders the sections unconstitutional." *In re Anderson, supra*, 447 P. 2d 125.

The cases of *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655, and *Giaccio* v. *State of Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed. 2d 447, do not compel a holding that the Arkansas procedure is unconstitutional. The Skinner argument was also made in *In re Anderson, supra*, and the Court summarily dismissed it with the assertion that the California statutes in question "do not contain an unconstitutional classification, and since under like circumstances every person convicted of first degree murder has the same chance for leniency as well as the same possibility of receiving the maximum sentence, there is nothing discriminatory in the sections." (447 P. 2d 127-128).

The *Giaccio* argument was also raised by petitioner in his appeal to the Court of Appeals for the Eighth Circuit. *Maxwell* v. *Bishop*, 8 Cir., 398 F. 2d 138, 149-150. In rebutting this contention, Judge Blackmun stated:

> "There is no question as to what is prohibited under the Arkansas rape statute. And the secondary argument in *Giaccio* is a far cry from that Arkansas statute. Of particular import is the court's footnote 8, p. 405 of 382 U.S., to the effect that in reaching its conclusion that the Pennsylvania statute was invalid, "we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Mr. Justice Stewart, in concurring, p. 405, felt that, despite this disclaimer, much of the reasoning in the opinion served to cast doubt "upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense." No other Justice joined him in that observation. We have no alternative, therefore, except to conclude that footnote 8 means what it says and that the Court did not, by its decision in *Giaccio*, cast doubt upon the constitutionality of a state practice which leaves to juries the power to fix punishment within legally prescribed limits. This thought was specifically applied later in a capital case by the majority opinion in *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967). We are not impressed with the defense characterization of footnote 8 as only a "careful reservation of a question" and referable "to jury sentencing generally, not capital sentencing."

See also *In re Anderson*, *supra* 447 P. 2d 127; *Johnson* v. *Commonwealth*, *supra*, 158 S.E. 2d 730.

B. *The Role of the Jury and the Standards Argument.*

As was noted earlier, one of the basic points of this case is whether the jury system is a practicable procedure in capital cases. Time and again petitioner refers to the arbitrary and unfettered discretion possessed by capital juries in Arkansas, which, of course, it is asserted, is the reason for the great need for "standards" to guide juries in determining who should live and who should die, as though jurors were some type of computer that had to be properly programmed in order to reach the correct result.

One of the greatest fallacies we see in the standards argument is that it overlooks the very foundation of the jury system. Jurors are the conscience of the community, and they, through the everyday experiences of life, know what type of conduct is so reprehensible as to require the infliction of some type of punishment, whether the case be one of murder or simple larceny; *In re Anderson, supra*, 447 P. 2d at p. 125; and it is submitted that to have a judge read to a jury a list of vague and indefinite "do's" and "don'ts," and they must of necessity be vague and indefinite, will in no way aid a jury in making its decision. If the standards do not comport with the conscience of the community, the jury will not abide by them, and if they do comport, the jury will take the standards into consideration anyway.

A good example of this point is petitioner's attempt to distinguish capital cases from those involving the "reasonable man" test. Petitioner admits the "reasonable man" test is imprecise, but yet he recognizes it as a standard. But that which is reasonable to one will not be reasonable to another, depending on the experience

each has had. The fact that each has been told to use a "reasonable man" test still leaves the matter totally with the individual juror, and the defendant can only hope that the jurors' ideas of what a reasonable man would have done favor him. And so it must be with standards in a capital case; whatever the standards are they must leave the decision to the individual juror, otherwise the standards will no longer be a guide to the juror but rather a leash to lead him to a specified result regardless of the dictates of his conscience.

This, we submit, is precisely what petitioner is seeking here. He attacks in his brief the discretion given capital juries for the following reasons: "But a death-sentencing jury need find no facts, either of a specific sort . . . or of a more general sort." (P.38); "Nor is there any legal prescription, to guide the jury or enable review of its judgment, of any *preclusive* factual findings . . . " (P.39); "Nor is the jury required to consider, or to take account of, any specified facts or concerns." (P.39); "Nor is there any enumeration, for the jurors', of specified facts or concerns which they *may* consider." (P.39); "Nor is there enumeration and proscription of *im*permissible considerations." (P.39). In short, petitioner wants the jury to be told that if they find X, Y and Z, then, despite the guilt of the defendant, he cannot be sentenced to death. He does not seek standards to *guide* the jury; he wants hard-and-fast rules that *tell* the jury how to decide the case, which in essence takes the decision away from the jury and amounts to legislation by the courts.

In essence, what we are saying is that jurors, being only human, are always going to be guided to some degree by their biases and prejudices. The "reasonable man" test cannot prevent the rich man, who can afford the

ablest of counsel, from recovering a hundred thousand dollars for an injury to his back while the poor man with the same injury recovers only ten thousand. Similarly, no set of standards, no legislature, and no court can ever totally eradicate injustice in capital cases.

This leads us logically to our next point which is well illustrated by a comparison of petitioner's brief and that of the *amici curiae*. At page 14 of the *amici* brief appears the following statement:

> Ill. Rev. Stat. Ch. 38, Sec. 1-7(g) (1967) does provide that the Court may hear evidence in mitigation before deciding if death is proper. Such evidence may concern the "moral character, life, family, occupation and criminal record of the offender." But nowhere in this statute does a standard appear by which the jury or judge can assess these very vague "mitigating circumstances."

In sharp contrast to the above quotation, petitioner points out at page 36 of his brief that: "In the process, hopefully, (the Judge) gains some generalizable experience, develops bases for rational comparative judgments; in any event, minimally, he evolves a 'feel' for how the cases 'line up'."

These two statements make it abundantly clear that it will never be possible to draft a set of considerations in mitigation of punishment which pleases everybody; and if we cannot agree on what considerations are relevant to mitigation, how can we ever possibly hope to agree upon a set of standards that has enough substance to be of some

benefit and yet is capable of being explained in sensible terms to a layman juror?[1] It is interesting that petitioner does not offer a model standard or set of standards.

II

Arkansas' single-verdict procedure for the trial of capital cases violates the constitution.

Like the argument of petitioner with regard to standards, this point is likewise neither new nor novel, and respondent respectfully submits that what this Honorable Court stated in *Spencer* v. *Texas*, 385 U. S. 554, 567, 568, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967) is determinative of the question:

> "To say that the two-stage jury trial in the English-Connecticut style is probably the fairest, as some commentators and courts have suggested, and with which we might agree were the matter before us in a legislative or rule-making context, is a far cry from a constitutional determination that this method of handling the problem is compelled by the Fourteenth Amendment. Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of

[1]You look at this problem of standards right in the face and it's awfully easy to talk about ships without rudders or compass; boats without oars and so forth, and about assigning a fox terrier to one person or another without standards, but in this area you just can't find workable standards. Any kind of formula that you put up would simply be magic words, at best. We haven't heard of any precise standards that wouldn't be like mouthing formulas to the jury that it should take into consideraion such and such factors and so forth. You can't get anything as precise as a rudder or an oar and so forth. That being the case, the question is whether you are going to have death or not. The State could say that every killing or certain killings, just automatically brought on the death penalty. The present system is a dispensation that the State has made. See transcript of proceedings of Supreme Court of California, **In re Anderson**, Crim. No. 11,572, March 28, 1968, pp. 107-108.

constitutional law, or even as a matter of federal procedure."

And the Court further stated:

> "To take such a step would be beyond the pale of this Court's proper function in our federal system. It would be a wholly unjustifiable encroachment by this Court upon the constitutional power of the State to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long at their rules are not prohibited by any provision of the United States Constitution, which these rules are not." (385 U.S. 569).

The Eighth Circuit Court of Appeals denied petitioner any relief on this point[3] on the basis of its prior decision in *Pope v. United States* 8 cir. 372 F. 2d 710, 727-730 (1967), wherein the Court noted:

> It may be the two-stage trial can be appropriately developed and made to serve a useful purpose under these statutes as they presently exist. It may be that the better solution is for the statutes to be revised so as to place the punishment power back in the hands of the judge where it traditionally has rested. It may be that the ultimate answer is legislation authorizing some narrow appellate review of sentences in extreme cases. These, however, are preliminary legislative matters for the Congress and not for the judiciary.

Petitioner cites *Hill v. United States*, 368 U.S. 424, 82 S. Ct. 468, L. Ed. 2d 417 (1961), for the proposition that "This Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command." (Petitioner's brief p. 71). Respondent

---

[3]Maxwell v. Bishop, supra.

cannot agree with this citation, particularly in view of what was said in *Stevens* v. *Warden*, 238 F. Supp. 334 (D.C. Md. 1965):

> The right of allocution in non-capital cases is not a right guaranteed by the Fifth or Fourteenth Amendments *Hill* v. *United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1961), *McGrady* v. *Cunningham*, 4 Cir., 296 F. 2d 690, 96 A.L.R. 2d 1268 (1961), although it is required by the Federal Rules of Criminal Procedure and by statute in several states."

Respondent's position on this point is further supported by the following statement from *Segura* v. *People*, Colo. , 431 P. 2d 768, 769 (1967):

> It is argued that to compel the presentation of this evidence would result in prejudice to defendant's right to decline to testify. Admittedly the Colorado statute requires the defendant to choose whether he will take the stand himself in an attempt to mitigate the crime, or to decline to testify. There is nothing in the statute which prevents the introduction of relevant evidence to establish mitigating circumstances. Such circumstances can be shown by witnesses other than the defendant. At the trial of defendant on the issue of guilt, no evidence whatever was offered on his behalf. It may well be that a better method of determining punishment could be devised. Numerous states in the nation follow the Colorado practice. We know of no jurisdiction in which it has been held that this practice purports to deny constitutional rights.

For the foregoing reasons, respondent respectfully submits there is no merit to this contention.

CONCLUSION

It appears to respondent, that this case is a prime example of the age-old situation of the man who wants to have his cake and eat it too. Petitioner first wants two juries. The second of these, the punishment jury, is somehow to be instructed as to all the things that it may and may not consider in determining the punishment. Further, in presenting evidence to this punishment jury he wants to be allowed to tell all the good things about himself while the prosecutor is prohibited from saying bad about him because "Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law." (Petitioner's brief p. 74). Thus, he seeks to make it impossible to ever get a death verdict, to outlaw the death penalty, which is merely doing indirectly what convicted defendants have never been allowed to do directly. This should not be permitted, and the judgment below should be affirmed.

Respectfully submitted,

JOE PURCELL
Attorney General

DON LANGSTON
Deputy Attorney General

Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent